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No. 806

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

CLARK MARINE CORPORATION,

Petitioner,

vs.

CARGILL, INC., CARGO CARRIERS, INC., LLOYD GRAVING AND TOM BETTS,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court of Appeals For The Fifth Circuit

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BRIEF FOR RESPONDENTS IN OPPOSITION

ROBERT L. STERN
ERWIN C. HEININGER
231 South LaSalle Street
Chicago, Illinois

LAURANCE W. BROOKS
Louisiana National Bank Bldg.
Baton Rouge, Louisiana
Attorneys for Respondents

McCORMICK & HENDERSON, INC., CHICAGO

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BRIEF FOR RESPONDENTS IN OPPOSITION

This is a suit for treble damages for alleged violation of Sections 1 and 2 of the Sherman Act and Section 4 of the Clayton Act (15 U.S.C. §§ 1, 2 and 15). After trial, the District Court found that the antitrust laws had not been violated. The trial court's opinion was adopted by the United States Court of Appeals for the Fifth Circuit, which affirmed *per curiam*.

OPINION BELOW

The *per curiam* opinion of the Court of Appeals for the Fifth Circuit (App. B of Petition) is not reported at 345 F.2d 103 (Pet. p. 2), but at 345 F.2d 79.

STATEMENT OF FACTS.

The Statement in the petition, once it gets beyond a general description of the industry, is incomplete and, as to significant matters, incorrect. The District Court's Findings of Fact (Pet. App. 41-54) fairly state the facts. In the interest of brevity, this Statement summarizes without repeating those Findings, amplifying them only when necessary to meet petitioner's contentions.

Defendant Cargill, a large exporter of grain, has since 1955 leased the only grain elevator in the Port of Baton Rouge from the Baton Rouge Port Commission. Defendant Cargo Carriers, Inc. (hereinafter CCI) is a transportation subsidiary of Cargill; it operates a barge line and is charged with the responsibility of providing itself or obtaining from other companies sufficient barges to transport Cargill grain down the Mississippi River system. Cargill shipments accounted for less than 2% of the total tonnage transported on the Misissippi River system during the period here involved. (Def. Ex. 19.)

Grain barges arriving at Baton Rouge are taken out of the river tows and parked in what is called a "fleet" prior to unloading at the elevator. Harbor tow boats smaller than the river tow boats switch the barges from the tow to the fleet area, between the fleet and the elevator, and then back to an up-river tow. These harbor services must be performed efficiently because, as the court found, de-

lays are costly to the various barge owners as well as to Cargill in the operation of the elevator. (Fdg. 6, Pet. App. 44; R. 542-43, 253, 155.)

By 1959, when the elevator's capacity was greatly increased, there was widespread dissatisfaction among the barge lines as to the quality of service provided by the principal existing fleeting and switching operators, Hutton and Louisiana Marine. Some moorings were not proper; barges broke away, became grounded and even sank; there were frequent and excessive delays; and direct radio contact between towboats and fleeters' offices was lacking (R. 548-49, 606-07, 615-16, 664-66, 817-19, 1056-57, 1060-61.) Witnesses from other barge lines, as well as from CCI, characterized their services as "not reliable" (R. 665-66), "very unsatisfactory" (R. 1060), and, indeed, "absolutely miserable." (R. 547.)

After repeated complaints proved unavailing, and after Cargill had unsuccessfully sought to induce the Greater Baton Rouge Port Commission itself to establish an improved fleeting and switching service, Cargill reluctantly authorized CCI to do so. CCI thereupon leased property suitable for a fleet just below the grain elevator site.

The District Court found that CCI's fleeting and switching services were "vastly superior to those which had been previously furnished by the other available companies." (Fdg. 9, Pet. App. 46.) Representatives of other barge lines "testified that they expected better service from Cargo, that they got better service from Cargo and that they were pleased by their choice." (Fdg. 20, Pet. App. 52.) Because of its "more efficient and more dependable service" CCI obtained practically all of the Baton Rouge grain barge fleeting and switching business. (Fdgs. 8, 9, Pet. App. 46.) These Findings, which seem

to be challenged in petitioner's fourth Question Presented, are supported by the testimony of many witnesses.[1]

Petitioner Clark Marine did not arrive upon the Baton Rouge scene with its harbor boat until about two years after CCI had opened its fleet. Its first location was at Devil's Swamp, seven miles upstream from the grain elevator in the main Baton Rouge Port area, but on a canal suitable for the dry dock, repair and cleaning activities which it first contemplated. In March 1961, it obtained a harbor towboat and attempted to enter the fleeting and switching business, apparently in the hope that industry would develop along the canal on which it was located. (R. 140-41.) But obviously Clark Marine could not compete for the fleeting or switching of *grain* barges at a location nearly seven miles further from the elevator than CCI's.[2]

Recognizing this, Clark Marine in September, 1961, moved to a new fleet at Red Dog Landing, across the river from CCI's fleet, and for the first time became competitive. It quickly obtained the business of four of the largest barge

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[1] CCI's service was described by witnesses from other barge lines as "substantially better" (R. 667) and "much improved" (R. 823); Federal Barge Lines was "completely satisfied" (R. 1058). Service to and from the elevator was more prompt and dependable; this enabled the barge lines to turn their barges more rapidly and minimize the time when they were unprofitably idle. (Fdg. 9, Pet. App. 46.)

[2] One of petitioner's witnesses testified that the switching cost would be double that of a fleet near the elevator (R. 101), and Clark itself later proposed charging four times as much (Compare Def. Ex. 73, p. 4 with R. 396-97).

lines on the Mississippi. By January, February and March, 1962, petitioner's fleeting and switching revenues had reached 39%, 41%, and 45% of the combined gross fleeting and switching revenues in Baton Rouge of Clark Marine and CCI from barge lines other than CCI itself. (Computed from Def. Ex. 105.)

Clark nevertheless lost money on this operation, as well as in all its other activities; it was "under-capitalized, poorly-operated, and over-expensed." (Fdg. 16, Pet. App. 50.)[3] As a result on May 25, 1962, it filed a petition in bankruptcy and on the same day commenced this lawsuit. (Fdg. 19, Pet. App. 51.)

Petitioner tries to convert the above facts into an anti-trust violation by claiming that CCI had threatened not to book the barges of any barge line which did not use CCI's Baton Rouge fleeting service. This charge was com-

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[3] Mr. Benton, a director, second president of and an attorney for petitioner, testified that Clark Marine had four employees or officers, besides Capt. Clark, who "were paid substantial salaries and all of them, I think, all of them had cars that the company furnished and they had expense accounts; they had boat crews, around the clock boat crews, when I was there and they also had one or two full-time cleaning men that were on salary. All of these men's salaries plus insurance and the amortization of their debts added up to something in excess of what their [Clark Marine's] sales were." (R. 789.)

Benton was aware of Clark Marine's poor financial condition before it began fleeting in the center of the harbor; he described it as "awful." (R. 795, 786, 806.) Benton wrote on Sept. 12, 1961 that Clark Marine's financial picture was "terrible". (Def. Ex. 68, p. 2.)

pletely disproved, as the trial court found. (Fdg. 20, Pet. App. 52.)[4]

Almost immediately after opening its fleet at Red Dog Landing, petitioner's lawyers charged defendants with threatening the barge lines. Cargill and CCI officials not only denied this and that Cargill had any such policy, but expressed a willingness so to inform the barge lines. They did so in a letter of October 18, 1961, which stated (R. 755; Def. Ex. 14):

> "While we value your business highly, we wish to state again that our fleeting service represents, as it always has in the past, an economic service and function entirely apart and separate from any other business activity and relationship we enjoy with you and that *your decision to fleet or not to fleet with us will not, as it has not in the past, be reflected in any way in the handling of any other business relationship with you.*"[5] (Italics supplied.)

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[4] Twelve witnesses, including two called by petitioner and eight representatives of other barge lines, as well as Cargill and CCI officials, testified that there had been no threats or pressure by any officers or employees of Cargill or CCI to use the fleeting and switching services of CCI in Baton Rouge. There was no testimony to the contrary. The record shows that the petitioner had also complained to the Antitrust Division of the Department of Justice, which took no action. (R. 804-05.)

[5] The petition (p. 16) asserts that Cargill "refused to take part" in a meeting set up to assure the barge lines on this point. The record shows, however, that Cargill took the position that before any such meeting should be held, petitioner's attorney Benton should discuss the matter with its "top echelon" at Minneapolis, but Benton decided not to do this. (R. 566-67.) Thereupon, CCI sent to the barge lines the letter quoted in the text, which made its policy so clear that a meeting was unnecessary.

In view of its inability to prove that defendants used threats "of economic reprisals" against the barge lines, as charged in the complaint, petitioner contends that threats were unnecessary to force the barge lines to use the CCI fleet, since they were aware that CCI was a substantial actual or potential customer. This argument assumes that, because of CCI's position as a customer, the barge lines were unable to make a free choice with respect to competing harbor services when CCI was one of the competitors. That assumption is, of course, contradicted by Clark Marine's ability to attract a number of the largest barge lines as soon as it began to operate in a competitive location.[6] And the two large barge lines which gave fleeting patronage to Clark thereafter received substantially *more* of CCI's hauling business than they had in the past, both dollar-wise and percentage-wise. (Def. Ex. 18; Fdg. 22, Pet. App. 53.)

Petitioner's theory that the barge lines would inevitably favor a large customer for their barges is contradicted not only by the fact that many of them didn't but also by

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[6] Petitioner intimates (p. 16) that this did not occur until after it had threatened defendants with antitrust action. But as early as August 22, 1961, two weeks before Clark opened its fleet at Red Dog Landing, and several weeks before its attorneys had charged defendants with violating the antitrust law, Clark Marine had:

> ". . . been told by Mississippi Valley Barge Line, the second largest carrier on the river system, that they intend to use these facilities for fleeting, harbor towing, and repair as soon as we are ready to offer the service. The largest carrier, American Commercial Barge Line, has told us that they were still considering the matter, but felt it would be decided in our favor." (Def. Ex. 64, p. 1.)

the economics of the industry. For there has been a shortage of grain barges "for a good many years." (R. 686-87.) During the grain harvest seasons, which begin when the river opens up in April and run through December, the barge companies "have more customers than we know what to do with." (R. 834.) The barge lines "don't have enough barges", and the shippers are crying for more. (R. 835.) As a result, the grain shippers are dependent upon the barge lines and the latter have the superior bargaining position, rather than the other way around.

The CCI officials who determined its policy and placed most of the orders for barges (Brandenborg and Kleitsch) testified that because of these facts they were not in a position to put pressure on any barge lines. Kleitsch stated (R. 688):

> ". . . I am in no position to [put pressure on the barge lines to use CCI's Baton Rouge fleet] . . . I am asking them for barges to haul grain. I would not want to diminish my chances of getting barges for grain by asking for an additional favor.'"

For CCI to have risked the good will of the barge lines, upon whom it depended to carry millions of dollars worth of grain down the river, in order to increase its profits from the operation of its small Baton Rouge fleet (totalling $16,867 from September, 1961, through May, 1962 (Def. Ex. 106)), would have been a case of the tail wagging the dog and of Cargill acting in complete disregard of its major interests.

The barge lines, of course, were also aware of these basic economic factors, and of the shippers' need for their serv-

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[7] See also Brandenborg's testimony (R. 749-50) and that of petitioner's witness Kitch, a former CCI employee. (R. 987.)

ices. A barge line officer testified that his company gave petitioner its fleeting and switching business because it hoped to get "better service by stimulating competition" (R. 1062), but that:

> ". . . There has been no change in our business relationship with Cargill or Cargo Carriers, Inc. subsequent to this switch. We continued to haul large quantities of grain for Cargo Carriers. There was no pressure on Mississippi Valley to favor Cargo Carriers to continue to use the fleet of Cargo Carriers, Inc. at the risk of losing grain traffic."

Other barge line officials said that they continued to use the CCI fleet because they thought it superior or because they were satisfied with it and saw no reason to change. (*E.g.*, Def. Ex. 116, R. 1057-58, 667-71.)

These facts, which we have only briefly summarized, fully support Finding of Fact 22 (Pet. App. 53-54) which reads as follows:

> "It is found as a fact, from the evidence adduced in this case, that even though Cargo Carriers did acquire practically all of the fleeting and switching business in the Port of Baton Rouge insofar as grain barges are concerned, this business was acquired by them through good, sound, and legal business practices, rather than by any illegal acts on their part. * * * The fact that American Commercial Barge Line, Mississippi Valley Barge Line, Union Barge Line, and John I. Hay Barge Line, constituting some of the largest barge lines operating on the River, switched their business from Cargo to Clark Marine, and that as a result thereof, their business relations with Cargo in no way deteriorated, very clearly indicates that these barge lines were free to place their business where they felt their interests could best be protected and promoted. The evidence clearly shows, by testimony from officials of all of the various barge lines, that they were com-

pletely and totally free to place their business where they saw fit, and that they felt under no compulsion of any kind to place their business with any particular fleeting or switching service."

The District Court concluded (Pet. App. 56-57) that "A position of monopoly, in itself, is not necessarily prohibited by the Sherman Anti-trust Act" when acquired "by superior technical skill and effective competitive activity," and:

> ". . . that the evidence adduced at the trial of this case clearly establishes that whatever superior position the respondents herein enjoy in the fleeting and switching business in the Port of Baton Rouge was acquired entirely by lawful means and by their application of superior technical skill and effective competitive activity, and that there is no showing of any kind in this case that respondents, or any of them, employed the use of coercion, threats, or other unlawful means to acquire or maintain the business which they currently enjoy. Petitioner has likewise failed to prove any conspiracy on the part of these respondents.
>
> "This Court further concludes, as a matter of law, that from the evidence presented during the trial of this case, the business failure experienced by petitioner, Clark Marine, resulted from its own under-capitalization, poor management, and ineptness in the business in which it was engaged, and that petitioner was in no way injured or damaged by any illegal activities on the part of these respondents." (Pet. App. 57.)

The Court of Appeals, agreeing with the District Court, affirmed. (Pet. App. 58.)

ARGUMENT.

The questions which the petition seeks to present are either not presented at all by the decisions below or turn upon the facts and circumstances of this case. No point of general importance possessing any merit is raised, nor is there any conflict of decision.

The fourth question on its face merely challenges a District Court Finding of Fact, which the Court of Appeals approved—the finding that CCI had obtained its "dominance" (that is, most of the business) in the fleeting and switching of grain barges in Baton Rouge because of superior service and management. This finding is overwhelmingly supported by the evidence (see pp. 3-4, *supra*), and we shall say no more about it.

A. The courts below did not apply a different criterion to petitioner because it was bankrupt, or improperly consider the evidence as to the reasons for petitioner's losses.

Petitioner's first point is that the evidence as to Clark Marine's mismanagement and under-capitalization is irrelevant to defendants' liability under the Sherman Act, when the question of the amount of damages was reserved for a subsequent hearing if liability were found.

Petitioner frames the question in terms of a different criterion of proof being applied to bankrupt plaintiffs. Contrary to petitioner's assertion (p. 19), the courts are not "in hopeless conflict" on this proposition, nor do any cases apply separate criteria to plaintiffs that are in bankruptcy. Nor did the courts below.

What the District Court did do was to admit evidence, mostly without objection,[8] as to petitioner's losses being caused by its own deficiencies, and to conclude (Pet. App. 57) that the evidence showed that Clark Marine's business failure "resulted from its own under-capitalization, poor management and ineptness" and not from the alleged illegal activities of the defendants.

The petition (p. 22) correctly states that as a result of the splitting of the issues the questions first to be tried were "whether or not defendants were singularly or jointly guilty of a violation of the Sherman Anti-trust Act and *whether the plaintiff suffered as a result* of such illegal actions" (italics supplied), but that "how much Clark suffered" is not in issue. The provision for treble damage suits in Section 4 of the Clayton Act allows recovery only to a person "injured in his business or property by reason of anything forbidden in the anti-trust laws" (15 U.S.C. §15.) A plaintiff's right of action depends both on proof of violation and of "damage to the individual plaintiff resulting proximately from the acts of the defendant which constitute a violation of the law." *Association of Western Railways* v. *Riss & Co.*, 299 F.2d 133, 135 (C.A. D.C., 1962), cert. den. 370 U.S. 916; *Hud-*

[8] Much of this consisted of petitioner's own financial records and files (Def. Ex. 33-47, 72, 84, 24-32) to the admissibility of which no objection was made. Rule 14 of the Court of Appeals provides that exhibits not objected to at trial may not be objected to on appeal. And Mr. Benton himself, president of Clark Marine before and at the time of its bankruptcy, testified to its "awful financial shape" before the move down from Devil's Swamp (R. 796; see R. 786-800) without objection on the ground now raised. Petitioner is in error in asserting that it had objected to such evidence at the unreported pretrial conference.

son Sales Corp. v. *Waldrip,* 211 F.2d 268, 274 (C.A. 5, 1954). "The *fact* of injury [causally connected with the defendant's wrongful act] must first be shown before the jury is allowed to estimate the *amount* of damage." *Flintkote Company* v. *Lysfjord,* 246 F.2d 368, 392 (C.A. 9, 1957), cert. den. 355 U.S. 835 (italics in original). See also *Story Parchment Paper Co.* v. *Paterson Co.,* 282 U.S. 555, 562 (1931); *Keogh* v. *Chicago & Northwestern R. Co.,* 260 U.S. 156, 162-63 (1922).

The proof that petitioner's losses were due to its own ineptitude was evidence that such losses did not result proximately (or otherwise) from the acts of the defendants. Thus the evidence and findings on this subject pertained to an element essential to the establishment of defendants' liability, and not merely to the amount or quantum of damages.[9]

The absence of evidence of any other cause of petitioner's failure would have permitted petitioner to argue that the losses were attributable to defendants' acts. Defendants thus clearly had the right to introduce evidence which would prevent the drawing of such an inference.

A similar point was raised in *Buckeye Powder Co.* v. *Du Pont Powder Co.,* 223 Fed. 881 (C.C.A. 3, 1915), affirmed 248 U.S. 55 (1918). Defendant there:

> ". . . insisted that the plaintiff's troubles were due to its own faults or blunders, such as improper organization, lack of capital, insufficient experience, in-

[9] The pretrial order was careful to differentiate between "(g) whether plaintiff was directly or proximately injured by any of the alleged acts", and "(h) assuming all of the foregoing issues are resolved in favor of plaintiff, whether plaintiff is able to prove the amount of any damages." (R. 25.) The latter question but not the former was reserved for a later hearing, if necessary.

> attention to business, misrepresentations to customers, inability to fill orders, and furnishing bad powder. A great deal of the record is devoted to this branch of the dispute, . . ." 223 Fed. at 885.

The jury returned a verdict for defendants, and the judgment entered upon the verdict was sustained by the Court of Appeals and this Court. Objection was made to a portion of the charge to the jury to the effect that petitioner's motives in going into the business might be relevant to the question of liability. The Court rejected this contention on the ground that petitioner's motives "might have bearing on the question whether the petitioner was sufficiently capitalized to meet normal conditions," and that the jury might consider the evidence "on the question whether the petitioner's failure was due to the defendant's oppression or to the petitioner's incapacity. . . ." (248 U.S. at 64.)

The evidence here of petitioner's financial history, which revealed that petitioner's losses were due to its own bad planning and inefficiency, was thus admissible to show that the losses incurred did not result "proximately from the alleged unlawful acts" of the defendants but were due to "petitioner's incapacity," as in the *Buckeye* case. Since the court could conclude from this and other evidence that Clark Marine's losses were not attributable in any way to defendants' allegedly unlawful acts, the evidence in question related to an essential element of petitioner's case and was thus clearly admissible.

The petition alleges a conflict between the *Buckeye* decision and that of the District Court in *United Exhibitors* v. *Twentieth Century Fox Film Distributing Corp.*, 31 F. Supp. 316 (W.D. Pa., 1940). But nothing in the *United Exhibitors* case held irrelevant evidence that a plaintiff's losses were not caused by the defendant. In a short opinion the District Court merely denied a motion to dismiss

a complaint which "alleges damage to property and business" (p. 317). The District Court went on to say that:

> "if no specific damages were shown by an established conspiracy, at least nominal damages would accrue to plaintiffs, as well as the injunctive relief prayed."

But this is not a holding that no injury need be shown to establish a cause of action under Section 4. In any event, a District Court dictum contrary to holdings of this Court and many courts of appeals would not be grounds for certiorari.

B. The evidence shows that the barge lines were not induced to and did not patronize CCI's Baton Rouge fleet because CCI was also a customer for barges.

Petitioner has abandoned the theory of its complaint that defendants threatened barge lines with the loss of grain barge traffic if they would not allow CCI to fleet and switch for them in the Port of Baton Rouge. The District Court's finding that "these contentions . . . were in no way proved" (Fdg. 20, Pet. App. 52) was compelled by a mass of uncontradicted testimony.

Petitioner has attempted to save its case by changing its theory. It claims that the barge lines, without any pressure from defendants, were nevertheless induced by CCI's status as a customer for their barges to use the CCI fleet rather than petitioner's, and that for CCI to benefit from this constitutes a violation of the Sherman Act by CCI. This argument is both unsupported by the facts and unsound in law.

In the first place, the record does not support the claim that the barge lines turned to CCI's fleet because it was a customer for their barges. As shown, *supra,* and in Findings 7, 8 and 9 (Pet. App. 44-47), the record establishes that CCI acquired most of the grain barge fleeting business in

and after 1959 because its predecessors were extremely inefficient and because it provided superior service. Clearly for a company merely to be the only business in a small market incapable of supporting "two or more companies" unless they also engage in "other business activities, of a profitable nature" (Fdg. 18, Pet. App. 51) is not improper in any way, and does not violate the antitrust laws when this position is achieved only by legitimate competitive methods. Thus the single barber or newspaper in a town which can only support one is not unlawful, even if by ordinary competitive methods he tries to get or keep all the business. Or to take an example used in the debates on the Sherman Act, a man who by "superior skill * * * got the whole business because nobody could do it as well as he could was not a monopolist," unless he used "means which made it impossible for other persons to engage in fair competition. . . ." (21 Cong. Rec. 3152.) As Judge Learned Hand said in *United States* v. *Aluminum Company,* 148 F.2d 416, 430 (C.A. 2, 1945):

> ". . . A single producer may be the survivor out of a group of active competitors, merely by virtue of his superior skill, foresight and industry. * * * The successful competitor, having been urged to compete, must not be turned upon when he wins."[10]

Petitioner did not obtain a towboat until March of 1961. It "vigorously" disputes (Pet. p. 15) the trial court's

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[10]See to the same effect *United States* v. *Paramount Pictures,* 334 U.S. 131, 171 (1948); *Union Leader Corp.* v. *Newspapers of New England, Inc.,* 284 F.2d 582, 584 (C.A. 1, 1960), cert. den., 365 U.S. 833; *American Football League* v. *National Football League,* 323 F.2d 124, 131 (C.A. 4, 1963); *John Wright & Associates* v. *Ullrich,* 328 F.2d 474 (C.A. 8, 1964); *Scott Publishing Co.* v. *Columbia Basin Publishers,* 293 F.2d 15 (C.A. 9, 1961); *United States* v. *du Pont & Co.,* 118 F. Supp. 41, 215 (D. Del., 1953), aff'd on other grounds 351 U.S. 377 (1956); *United States* v. *Harte-Hanks Newspapers, Inc.,* 170 F.Supp. 227, 229 (N.D. Tex., 1959).

finding (Fdg. 12, Pet. App. 48) that its location at Devil's Swamp, seven miles above the grain elevator, was responsible for its inability to compete for grain barge traffic between March and September, 1961. But this was so thoroughly established by the testimony of petitioner's own witnesses that the court shut off further testimony on the point as cumulative. (R. 635.) Even in the absence of oral testimony, it would seem obvious that a maritime parking lot seven miles from the elevator to which the grain barges had to be towed for unloading could not compete with a lot next door, any more than an automobile parking lot one mile from a theater could attract the cars of the theater-goers if another lot was located next to the theater.[11]

Petitioner admits (Pet. p. 14) that during this period it "had no fleeting business of barges whatsoever", though it was "immediately adjacent" to the barge terminal on the canal on which it was located. But it does not appear that there was any appreciable traffic to this terminal.[12] Whether there was or not is immaterial, since

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[11] The record shows the importance of proximity in the Baton Rouge area. Just as CCI and eventually petitioner handled the bulk of the grain barge fleeting and switching business because their fleets were close to the elevator, Baton Rouge Coal & Towing Co. retained the bulk of the petro-chemical business because its fleet, two miles or so upstream, was closest to the petro-chemical plants. CCI got very little of this traffic.

[12] Petitioner's statement (p. 14) that "it was immediately adjacent to the Baton Rouge barge canal dock where some 289 barges, more or less were docked during the year 1961" confuses the general cargo dock near the center of Baton Rouge, which had a substantial volume of business, with the barge terminal dock at the end of the Devil's Swamp canal which had little or none. The 289 barge figure comes from a table which lumped the two together as "all other general docks [excluding the grain elevator] under jurisdiction of the greater Baton Rouge Port Commission." (Pl. Ex. 11.)

CCI did not get it. CCI only "moved two barges up there" during that period (R. 443), and thus could not have been the cause of petitioner's inability to secure whatever barges were destined for the Devil's Swamp area.

The period from September, 1961, to May, 1962, when petitioner went into bankruptcy, was the only time in which petitioner was so located as to be competitive with CCI. As shown above, within a few months it had obtained over 40% of the barge line business. This in itself proves that the barge lines were not "inevitably" induced to use CCI's fleet by CCI's dual position. In the absence of proof that petitioner's service was superior in any noticeable respect, 40% was a very good showing for a new competitor.

The proof that the barge lines dealing with petitioner's fleet did not lose their share of CCI's shipments during this period proves CCI's good faith in notifying them that it would not consider whether a barge line fleeted with it in the allocation of barge bookings. And the evidence as to the shortage of barges shows that CCI—which needed only about 2% of the barges on the river—did not possess the economic power which might have caused the barge lines to feel, without being told, that they must use its fleet in order to keep their barges moving.

Thus in none of the periods to which petitioner refers was there either monopoly power, use or misuse of monopoly power, intent to monopolize, or any restraint or improper act whatsoever.

Petitioner's theory is that because CCI entered the fleeting business in Baton Rouge while continuing to be a barge line customer, CCI became an unlawful monopolist since its dual status might have caused barge lines to favor its fleet without any pressure on its part. Even if, contrary to what the record shows, the barge lines had done this, no antitrust violation *by defendants* would have been established.

What petitioner's position comes down to is that merely for CCI to engage in the two activities at the same time is unlawful. That means that no matter how inefficient the service provided by the companies performing the fleeting in Baton Rouge prior to April 1959, or how costly their inefficient operations were to CCI and the Cargill elevator, it was unlawful for CCI to undertake to provide an improved service because it would then be occupying what petitioner calls a "dual role." Nothing like that has ever been held to be unlawful monopolization or restraint of trade.

No authority even remotely suggests that the mere occupancy of a position whereby reciprocal dealing in different commodities or services can occur violates the Sherman Act. The closest case is one of three early Federal Trade Commission proceedings[13] against companies which sought to compel others to buy one product or service from them if it wished to sell them another. In the *California Packing* case, the packing company was a large shipper over steamship lines and also owner of a terminal on San Francisco Bay; it sought to compel the shipping lines to use its terminal by threats that it would not patronize them if they did not do so. The case is thus very much the same as that originally alleged by petitioner here. The Federal Trade Commission found the coercion and compulsion unlawful, but specifically provided in its order that nothing should prohibit the packing company from also engaging in the terminal business so long as it made no effort to take advantage of its status

[13] *California Packing Corp.*, 25 F.T.C. 379 (1937); *Waugh Equipment Co.*, 15 F.T.C. 232 (1931); *Mechanical Manufacturing Co.*, 16 F.T.C. 67 (1932).

as a shipper of freight. Thus the Commission found it not unlawful for a company to be both a large shipper and a terminal operator, the very situation about which petitioner complains here.

Indeed, it must be obvious that the mere existence of reciprocal trading possibilities cannot be illegal. They exist throughout the economy. Railroads transport automobiles and auto parts and trucks and steel and oil and at the same time are large purchasers of automotive equipment, steel, and oil. Manufacturers sell equipment and material to carriers who sell transportation service to them. Lawyers serve carriers and are served by them. The mere existence of these dual relationships cannot be and has never been held unlawful.

Reciprocal dealing has been treated as akin to a tying arrangement, a kind of tying clause in reverse. Just as it was unlawful for IBM to require customers for its machines to buy from it the cards to be used in the machines (*International Business Machines Corp.* v. *United States,* 298 U.S. 131 (1936)), it would be unlawful for IBM to require sellers of paper or other materials to it to agree to use its typewriters or other machines. But it has never been suggested by the Government, the courts, or anyone else that it is unlawful for IBM to sell cards or to buy materials at the same time that it is selling machines. And this is so even though, without pressure from IBM, the user of its machines would be more likely to buy cards from it, or even though the paper manufacturer would be more likely to use IBM typewriters if IBM bought its paper.

The cases cited by petitioner all involved misuse of monopoly power. *United States* v. *Griffith,* 334 U.S. 100 (1948), upon which petitioner heavily relies (Pet. pp. 28-29), was clearly a case in which monopoly power was *used* to restrain competition. The Griffith chain of theatres entered into over-all licensing agreements giving the chain's

theatres preferential treatment, and thereby preventing competitors from obtaining sufficient first-run films (p. 103). These agreements were on their face exclusionary insofar as the preferential runs were concerned. "Monopoly rights in the form of certain exclusive privileges were bargained for and obtained" (p. 109). Threats or other extrinsic evidence of intent to exclude were obviously superfluous. The "necessary and true result of the master agreements" (p. 106) was to restrain and monopolize trade.

Petitioner argues (Pet. p. 29) that *Griffith* holds that threats to withhold business are unnecessary. But the statement in *Griffith* as to the absence of threats must be read in light of the fact that monopoly power was there used to secure exclusionary contracts which on their face harmed Griffith's competitors. Indeed, the very passage which petitioner quotes in bold face, and also the paragraphs which follow (334 U.S. at 107-09), contain repeated references to the *use* of *monopoly* power in order to stifle competition.

Neither *Griffith* nor any other case suggests that a company which is a large buyer of services from others may not lawfully undertake a new line of activity which may attract customers who hope thereby to induce the company to patronize them. And it makes no difference whether this possible benefit may result directly as in *Griffith* or reciprocally as is said to be the case here.

We add that *Federal Trade Commission* v. *Consolidated Foods Corp.*, 380 U.S. 592 (1965), to which petitioner refers in another connection, in no way supports petitioner's position. As this Court knows, *Consolidated Foods* was a Section 7 merger case.

"Section 7 of the Clayton Act is concerned 'with *probabilities,* not certainties.' * * * Reciprocity in trading as a result of an acquisition violates § 7, if the *probability* of a lessening of competition is shown." (380 U.S. at 594-95. Italics supplied.) The test in a suit for treble damages for violation of Sections 1 and 2 of the Sherman Act, however, is entirely different. The plaintiff must establish that the defendant actually restrained trade or monopolized in violation of those sections and that plaintiff has been injured thereby. In order to sustain a recovery of damages, it clearly is not enough to prove merely a probability that competition may be restrained in the future.

Furthermore, in the *Consolidated* case the Court stated that the evidence supporting the Commission included evidence that "reciprocity was tried over and again and it sometimes worked" (p. 600). The Court was thus dealing with a deliberate attempt to take advantage of the reciprocal buying situation created by the merger. Indeed, the company there argued only that the attempt had failed, and that the experience after the merger showed that competition was not lessened thereby. In the instant case there was no evidence that defendants tried to take advantage of the reciprocal possibilities. On the contrary the testimony showed that it was not CCI's policy to do this, and the trial court found, on the basis of the testimony of many witnesses, that no such attempt was made.

Nothing in the *Consolidated Foods* opinion suggests that a company, without merger but by direct expansion, may not lawfully enter a new line of business merely because the result may be that it buys one product or service from a company to which it sells another.

C. The lower court did not err in excluding, on the basis of an objection initiated by petitioner, some evidence as to statements made to the person who took over petitioner's fleet after petitioner's bankruptcy.

Petitioner urges error in a limitation upon its examination in rebuttal of a witness, Prewitt Nelson, who had been a stockholder, officer and director of petitioner and whose company took over the fleet at Red Dog Landing after petitioner's bankruptcy. The contention is that petitioner was precluded from introducing evidence that several barge line representatives had told Nelson, after petitioner had ceased operations, that they would not give Nelson their fleeting and switching business because CCI used their barges in the shipping of its grain.

Proof that the barge lines had favored CCI for this reason should obviously have been introduced as a part of petitioner's affirmative case. Petitioner is complaining about the restriction put upon a rebuttal witness. Nelson was permitted to contradict the denial of a barge line witness that Nelson had been told any such thing. (R. 859-62, 884.) As to events relating to Nelson's business, testimony not in specific rebuttal of anything introduced by the defendants was barred by the trial court for good reason.

For petitioner, not defendants, was originally responsible for the ruling excluding evidence as to Nelson's operation after petitioner had gone out of business. Petitioner is not now entitled to complain of subsequent rulings based upon the one which it caused the court to make. During the pretrial proceeding when defendants sought to subpoena the records of Nelson's company, the court sustained *petitioner's* objection on the ground that this was a needless imposition on Nelson for a period irrele-

vant to the case. (R. 55-56.)[14] Throughout the trial the court adhered to this position, first urged upon it by petitioner, on the ground that it would be unfair to change the ruling after barring defendants from ascertaining the facts as to Nelson's operation during that later period. (R. 876.) Since the documents which defendants were precluded from subpoenaing could have established that Nelson's company obtained business from barge lines contrary to the alleged statements of their representatives to Nelson, it would have been prejudicial to defendants and erroneous for the trial court to have admitted Nelson's testimony after having excluded the subpoenaed documents on petitioner's objection.

Furthermore, the testimony in question related to a period after petitioner had ceased doing business and petitioner could not have suffered damage as a result of anything occurring in the period to which the testimony relates. Whether testimony as to events happening after the period involved in the case is pertinent to prove the policy of the barge lines during that period is a matter within the discretion of the trial court. *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 230 (1940).

In any event the evidence which petitioner sought to introduce would not have affected the result, as the court below found. An offer to prove what such testimony would have been was incorporated in a deposition taken about six months after the end of the trial (three months after the entry of judgment and one month after the notice of

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[14] The petition concedes (p. 33) that petitioner objected to the subpoena served upon Nelson by defendants at the opening of the case, but states (pp. 32-33), without supporting record reference, that during the pretrial proceedings the trial court initiated on its own motion the exclusion of evidence as to the post-bankruptcy period. Nothing in the record substantiates this statement, and it is not correct.

appeal). The Court of Appeals, though concluding that this deposition should not have been considered, also was "of the opinion that a consideration of it would not in any way affect the disposition of the appeal." (Pet. App. 58.)

In so deciding, the Court of Appeals was clearly correct. For the most that the post-trial deposition, taken as an offer of proof, showed was that two representatives of barge lines which were using CCI's fleet indicated that they would be influenced by CCI's status as a shipper in determining whether they would deal with Nelson's fleet. There was no suggestion that Cargill or CCI made any effort to take advantage of their dual position. Nor does the deposition establish that *any* barge line, while Clark Marine was in operation, or any other barge line after Nelson's company took over the fleet, was so influenced. As we have shown, some originally chose to use the CCI fleet in 1959 because of its superiority to its then competitors and stayed with it because they did not believe that the service subsequently offered by petitioner was any better. Others, and among them some of the largest lines on the river, switched to petitioner when it opened its fleet at a competitive location and thereafter remained with Nelson's company without loss of CCI barge bookings.

Whether the Nelson offer of proof should have been received clearly involves no question of importance worthy of review.

CONCLUSION.

For the above reasons the petition for certiorari should be denied.

Respectfully submitted,

ROBERT L. STERN
ERWIN C. HEININGER
LAURANCE W. BROOKS
Attorneys for Respondents